

**United States Court of Appeals**  
**For the Ninth Circuit**

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O. H. BENGSTON, as Administrator of the Estate of  
Phinice Van Pelt, deceased, *Appellant*,

vs.

ANDREW NESHEIM, *Appellee*.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

**BRIEF OF APPELLANT**

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# United States Court of Appeals

## For the Ninth Circuit

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O. H. BENGSTON, as Administrator of the Estate of Phinice Van Pelt, Deceased,	} No. 15822
<i>Appellant,</i>	
vs.	
ANDREW NESHEIM,	<i>Appellee.</i>

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

### BRIEF OF APPELLANT

---

#### I.

#### JURISDICTION

This action is one for wrongful death in which appellant claims jurisdiction under 28 U.S.C.A. §1332(a) (1) which provides:

“The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$3,000.00 exclusive of interest and costs and is between:

“(1) citizens of different States.”

The jurisdictional facts are contained in Paragraphs I and II of plaintiff's complaint. Paragraph I provides in effect that the plaintiff brings this action in his capacity as Administrator of the Estate of Phinice Van Pelt; that plaintiff is a resident of Jackson County,

State of Oregon and that Phinice Van Pelt during his lifetime was a resident of Curry County in the State of Oregon and that the defendant is a resident of the City of Edmonds in the County of Snohomish, State of Washington, and therefore a diversity of citizenship exists between the parties (Tr. 1). Paragraph II provides in effect that this is a civil action to recover damages and that the amount in dispute exceeds the sum of \$3,000.00 exclusive of interest and costs and that in fact judgment is demanded in the sum of \$20,000.00 (Tr. 1-2).

## II.

### STATEMENT OF THE CASE

There is but one question present in this appeal and we believe that it is one of first impression. The question is, whether or not the limitational period contained in the foreign wrongful death statute is tolled by the fact that the defendant removed himself to a jurisdiction in which the tolling provision for removal to or from that State applies to a wrongful death action. The facts essential to the determination of the above question are not in dispute. The facts show that on or about January 17, 1955, Phinice Van Pelt was drowned in the Chetko River in the State of Oregon (Tr. 11), that approximately two years and three weeks after the death of the said Phinice Van Pelt, plaintiff, his administrator, commenced this action against the defendant, in the United States District Court for the Western District of Washington alleging the negligence of the said defendant and that said negligence was the proximate cause of the death of the said Phinice Van Pelt (Tr.



11). At all times pertinent to this action there were two statutes in full force and effect in the State of Oregon (Tr. 11-12), the two statutes being:

“O.R.S. 30.020. *Action by Personal Representative for Wrongful Death.*

“When the death of a person is caused by the wrongful act or omission of another, the personal representative of the decedent, for the benefit of the surviving spouse and dependents, and in case there is no surviving spouse or dependent, then for the benefit of the estate of the decedent, may maintain an action against the wrongdoer, if the decedent might have maintained an action, had he lived, against the wrongdoer for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$20,000.00 which may include a recovery for all reasonable expenses paid or incurred for funeral, burial, doctor, hospital and nursing services for the deceased.”

“O.R.S. 12.150. *Suspension of Running of Statute by absence or concealment.* If, when a cause of action accrues against any person, he is out of the state or concealed therein, such action may be commenced within the applicable period of limitation in this chapter after his return into the state, or the time of his concealment; and if, after a cause of action has accrued against a person, he shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.”

Also in full force and effect in the State of Washington was (Tr. 13):

“R.C.W. 4.16.180. *Statute Tolloed by Absence from State, Concealment, etc.*

“If the cause of action shall accrue against any person who is a non-resident of this state, or who is a resident of this state and shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state, or after the end of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limit for the commencement of such action.”

Finally there is the fact that the defendant departed from the State of Oregon to the State of Washington at a time less than two years before plaintiff commenced this action (Tr. 12). On September 19, 1957, the defendant moved for summary judgment under Rule 56(b) F.R.C.P. (Tr. 8-10). The court granted the motion for summary judgment in an order entered on September 27, 1957 (Tr. 14-16). The plaintiff appellant contends that the limitational period is tolled by the defendant's removal and therefore brings this appeal.

### III.

#### ASSIGNMENT OF ERRORS

The appellant respectfully submits that the United States District Court for the Western District of Washington, Northern Division, committed the following errors:

1. The court erred in granting defendant's motion for summary judgment.
2. The court erred in decreeing that plaintiff take nothing by his complaint.
3. The court erred in denying plaintiff his right to trial by jury on an issue of fact.

#### IV.

### ARGUMENT

#### A. Introduction

The determination of the question before the court rests on the law of conflicts, a field in which general principles and public policy are the controlling factors. Insofar as this case is concerned the most recognized principle is that statutes of limitation are a matter of procedure and are therefore governed under the laws of the forum. 11 Am. Jur. Conflicts p. 505. It was in fact conceded by the defendant in argument before the lower court in the argument on the motion for summary judgment. It is conceded by the appellant that, as an exception to the general rule the forum will usually apply the limitational period contained in a foreign wrongful death statute. However, even in that situation the forum will first determine whether or not the limitational period violates the public policy of the forum.

*Lewis v. Read Construction Finance Corporation* (D.C. Cir. 1949) 177 F.2d 654.

Certainly the criterion of this case will be the public policy of the State of Washington.

As will be discussed in a later section, the law is not clear as to whether or not the Oregon tolling provision, O.R.S. 12.150, is applicable to its wrongful death statute. Appellant's first argument therefore will proceed under the theory that the Oregon tolling provision is not applicable and will show that the Washington court in that event would apply the Washington tolling provision. Appellant's second argument will show that the Washington court would in fact construe the Oregon tolling provision as being applicable to the wrongful death statute.

## **B. The Law of the State of Washington**

### **1. The Application of the Washington Tolling Provision to a Wrongful Death Action**

In Washington the wrongful death statute, R.C.W. 4.20.005 - 020 (the provisions of which are not pertinent to this action) does not contain a limitational period and is therefore governed by the general statute of limitations for personal injuries, R.C.W. 4.16.080.

*Dodson v. Continental Can Company* (1930)  
159 Wash. 589, 294 Pac. 265;

*Grant v. Fisher Flouring Mills Company*  
(1935) 181 Wash. 576, 44 P.2d 193;

*Cook v. Clallam County* (1947) 27 Wn.2d 793,  
180 P.2d 573.

Said statute provides as follows:

R.C.W. 4.16.080. "*Actions limited to three years.*

Within three years: \* \* \*

"(1.) \* \* \*

"(2.) An action for taking, detaining, or injur-

ing personal property, including an action for the specific recovery thereof or for any other injury to the person or rights of another not hereinafter enumerated.”

Although we have found no cases in point in the State of Washington, the arrangement of the statutory provisions manifest that the pertinent tolling provision, R.C.W. 4.16.180, governs all actions under R.C.W. 4.16.080. Under the aforesaid tolling provision a cause of action does not begin to run against a person until his entry into this state.

*Krussow v. Strixrud* (1949) 33 Wn.2d 287, 205 P.2d 637;

*Miller v. Miller* (1916) 90 Wash. 333, 156 Pac. 8;

*Omaha National Bank v. Lindsay* (1906) 41 Wash. 531, 84 Pac. 17.

The law is therefore clear that in Washington a wrongful death action, at least insofar as concerns the statute of limitations, is no different than any other action for personal injuries; and removal or absence of the defendant from the state tolls the running of the limitation period.

## **2. The Public Policy of the State of Washington**

The appellant apprehends that the appellee will argue that the two-year limitation period of the Oregon Wrongful Death Statute is a matter of substantive law and cannot be tolled by the removal of the wrongdoer from the state. Assuming that the foregoing proposition is true, it is appellant's position the public policy of the State of Washington would forbid the application of that rule in this state. The leading Washington



case in this field, and one that is pertinent in view of the fact that it discusses the Oregon Statute, is *Richardson v. Pacific Power and Light Company* (1941) 11 Wn.2d 288, 118 P.2d 895. In this case the deceased met death in Oregon by electrocution from one of defendant's fallen power lines. His administratrix brought suit under the Oregon wrongful death statute in the State of Washington. One of the defenses argued by the defendant was that the distribution of the funds from a judgment was different than that provided in the Washington Statutes on wrongful death and that therefore the Oregon Wrongful Death Statute should not be enforced in the State of Washington. The court held that this particular distinction would not cause a bar to the action. However, in arriving at this decision the court enunciated the principles applicable to this kind of case. At 11 Wn.2d 300, the court, after announcing the rule that an action based upon a wrongful death statute could be brought in another state even though the statutes of the *lex loci* might be different than those of the *lex fori*, stated:

“There is an exception to this later general rule however which is to the effect that a foreign cause of action will not be enforced where to allow suit thereon would be contrary to the strong public policy of the State in which enforcement is sought.”

The court then went on to state at the bottom of the same page:

“Generally speaking the public policy of a State is to be found in its constitution, its statutes and rules laid down by its court.”

The Washington courts have held that Washington statutes relating to limitations are legislative declarations of public policy. *Arthur and Co. v. Burke* (1915) 83 Wash. 690, 145 Pac. 974, cited with approval in *Walker v. Slig* (1945) 23 Wn.2d 552, 161 P.2d 542. Moreover, the Washington courts have stated that statutes of limitation although not an unconscionable defense are not such a meritorious defense either law or fact should be strained to aid it.

*Hein v. Granville Farmers Elevator Co.*  
(1931) 164 Wash. 309, 2 P.2d 741, 78 A.L.R.  
631;

*Bickwire v. Reard* (1951) 37 Wn.2d 748, 226  
P.2d 192.

There is one case in which the Washington court presumed that another state had a tolling statute similar to R.C.W. 4.16.180, in order to avoid the bar of the statute of limitations. *Miller v. Miller, supra*.

It is also interesting to note that in the *Richardson* case the defendant excepted to an instruction of the lower court on the presumption of due care of the decedent. In overruling the exception, the Supreme Court stated at 11 Wn.2d 312:

“In discussing the assignment upon which appellants’ present contention is based, we proceed upon the recognized rule that, in suits upon foreign causes of action, all presumptions and inferences of fact, being of a purely procedural character, are governed by the law of the forum.\* \* \* The law of Washington is therefore controlling upon this phase of the case.”

Certainly, the rules and law on the presumption of due care by the decedent affect the substantive rights of a

prospective plaintiff far more frequently than the statute of limitations. However, the Washington court will apply its own procedural rules in determining whether or not the presumption of due care applies in a particular case irrespective of the rules of the *lex loci* and thereby indicates that where a matter is procedurally in the State of Washington it will be applied under the Washington rules of procedure.

From the above it clearly appears that the Washington legislature has decreed that a limitation period on a foreign cause of action shall not begin to run until the person has entered this jurisdiction. The courts of Washington have held that a decree of this nature is a statement of public policy of the state and have themselves not been favorable to an interpretation which results in a bar through the statute of limitations. Furthermore, the Washington court is jealous of applying its own procedural rules. Therefore, conceding for the purposes of argument that respondent's interpretation of the Oregon statute is correct, there can be little doubt that the Washington Supreme Court would hold that interpretation to be invalid in this state.

### **C. The Application of the Oregon Tolling Statute to the Wrongful Death Statute**

The previous argument has proceeded on the theory that the Oregon tolling provision, O.R.S. 12.150 does not apply to the Oregon wrongful death statute, O.R.S. 30.020. By doing so, appellant has not in any way intended to indicate that the defendant's contention in that respect is a correct interpretation of the law of the State of Oregon. As of the writing of this brief a



pellant is aware of no case in the State of Oregon passing upon this point. In the lower court the appellee placed great weight on *Burns v. Whiteside*, 35 Ore. 305, 57 Pac. 637, in which there is language to the effect that the tolling statute only applies to common law actions. Clearly the statement to that effect was pure dictum as the Oregon court eventually held that the plaintiff's cause of action was not barred by the statute of limitations. Moreover, there is nothing in O.R.S. 12.150 to indicate that it should be given such a limited instruction. In *Jameson v. Potts*, 55 Ore. 292, 105 Pac. 93, a case in which the tolling statute was held applicable, there was no limitation placed upon it.

The lower court gave considerable weight to *Laidlow v. Oregon Railroad and Navigation Co.* (9 Cir. 1897) 81 Fed. 876 (Tr. 16). That decision had language to the effect that the two-year limitational period was a matter of substantive law, and no action could be brought thereafter. Again this language was dictum in view of the fact that the court held that the action was not barred. Moreover the decision was long prior to *Erie v. Thompkins* (1938) 304, U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188.

The most important factor is the fact that this action is brought in the State of Washington, and must be determined under the Washington law with respect to conflict of laws. *Klaxon v. Stenton Electric Co.* (1941) 313 U.S. 487, 61 S.Ct. 1021, 85 L.Ed. 1477. There are a long line of decisions in the State of Washington holding that the party asserting application of a foreign law different from that of the forum has the bur-

den of pleading and proving that law. A few of the more recent cases are as follows:

*Allen v. Saccomanno* (1952) 40 Wn.2d 283,  
242 P.2d 549;

*Laughlin v. Marsh* (1944) 19 Wn.2d 874, 14  
P.2d 549;

*Walnut Park Lumber and Coal Co. v. Roan*  
(1933) 171 Wash. 362, 17 P.2d 896.

Admittedly the Oregon statutes are in effect pleaded and proven since they are made a part of the stipulation, but the non-application of the tolling statute O.R.S. 12.150 to the wrongful death statute O.R.S. 30.020 is not proven; it cannot be, as there are no cases in Oregon deciding the point. In view of this fact it will be presumed that the tolling statute does apply to the wrongful death action, for that is the law of the State of Washington. This proposition is supported by *Miller v. Miller, supra*, in which the court held that it would presume that the departure of the defendant from a sister state would toll the statute of limitation in that sister state. Certainly and in view of the public policy of this state, as previously discussed, Washington courts would require a stronger showing that the tolling provision does not apply to the wrongful death statute.

## V.

## CONCLUSION

There is but one question presented in this appeal; that is, whether or not the limitation period of two years in the Oregon wrongful death statute was tolled by defendant's removal to the State of Washington at a time less than two years before the commencement of the action. The law in the State of Washington is clear that the departure from this state tolls the statute of limitations as applied to a wrongful death action and that the time will not begin to run until a defendant enters this state. The law on this question in Oregon has never been determined. In the event this court should hold that the tolling provision O.R.S. 12.150 is not applicable to the Oregon wrongful death statute, it is clear that this interpretation would be contrary to the public policy of the State of Washington and, as such, would not be applied by this state's courts. Moreover, if this question were before the Washington courts they would hold that the burden of proving the inapplicability of the Oregon tolling provision to the wrongful death statute is upon the defendant. In view of the fact that there are no decisions to that effect in the State of Oregon, there is an irrebuttable presumption that Oregon's law is the same as that of the State of Washington. Therefore, in either event the action would be tolled by defendant's removal to the State of Washington.

Respectfully submitted,

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